

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

LATCHMIE TOOLASPRASHAD,

Plaintiff,

v.

11-CV-0922Sc

IMMIGRATION & CUSTOMS ENFORCEMENT,

Defendant.

**DEFENDANT'S REPLY MEMORANDUM OF LAW IN FURTHER
SUPPORT OF MOTION TO DISMISS THE COMPLAINT FOR
LACK OF JURISDICTION AND FAILURE TO STATE A CLAIM**

PRELIMINARY STATEMENT

Defendant submits this Reply Memorandum in further support of its motion, pursuant to Fed.R.Civ.P. 12(b)(1) and (6), to dismiss the pro se Complaint of plaintiff Latchmie Toolasprashad ("Toolasprashad") for lack of jurisdiction and failure to state a claim. Defendant's motion, which was filed on July 17, 2012, was made on grounds that (a) because Toolasprashad failed to comply with statutory requirements for making a FOIA request, the Court lacks jurisdiction over his claim due to plaintiff's lack of standing and failure to exhaust administrative remedies, (b) because the National Records Center ("NRC") is not a party to this action, the Court lacks jurisdiction over any claim asserted against the NRC, (c) because Toolasprashad failed to comply with the requirements for making a Freedom of Information Act ("FOIA") claim, he fails to state a claim upon which relief can be granted,

and (d) the claim asserted in the Complaint was rendered moot by disclosure of the requested records to Toolasprashad's former attorney and to Toolasprashad himself. See Defendant's Memorandum of Law in Support of Motion ("Defendant's Memorandum") (Dkt. No. 11).

On May 3, 2013, Toolasprashad, by his recently appointed pro bono attorney, Eric W. Schultz, Esq., filed a response to the Defendant's motion. Plaintiff's Memorandum in Response to Motion ("Plaintiff's Memorandum") (Dkt. No. 41). As set forth more fully herein, the underlying facts offered by Defendant in support of the instant motion to dismiss are not in dispute, and accordingly, Defendant's motion should be granted.

ARGUMENT

**THE COURT LACKS SUBJECT MATTER JURISDICTION BECAUSE
THERE HAS BEEN NO FOIA REQUEST PERTAINING TO TOOLASPRASHAD
ADDRESSED TO DEFENDANT IMMIGRATION AND CUSTOMS ENFORCEMENT.**

Plaintiff's Memorandum accurately observes that the instant proceedings involve a very narrow issue regarding the Government's response to Toolasprashad's purported FOIA request. See Plaintiff's Memorandum, p. 2. Further, undisputed facts show that Toolasprashad failed to make a proper FOIA request in accordance with law. See Declaration of Ryan Law executed on July 10, 2012 (Dkt. No. 9), and

Declaration of Jill A. Eggleston, executed on July 3, 2012. (Dkt. No. 10).

Moreover, Plaintiff's Memorandum, which asserts that Toolasprashad merits a decision on whether he exhausted administrative remedies, observes that neither Toolasprashad nor his former attorney, Kurt Saccone, Esq., filed an administrative appeal regarding the disclosure that was made in response to Mr. Saccone's FOIA request. Id., p. 4; see also Declarations of Ryan Law and of Jill A. Eggleston (Dkt. Nos. 9 and 10). Thus, undisputed facts also show that Toolasprashad did not exhaust administrative remedies. Accordingly, Toolasprashad's Complaint must be dismissed. See Union Leader Corp. v. U.S. Dept. of Homeland Sec., 2012 WL 1000333, *2 (D.N.H., Mar. 23, 2012) (plaintiff must exhaust the right to administratively appeal that denial before filing suit); see also Oglesby v. U.S. Dep't of Army, 920 F.2d 57, 61-62 (D.C.Cir.1990) ("Courts have consistently confirmed that the FOIA requires exhaustion of [the statutory] appeal process before an individual may seek relief in the courts.").

Significantly, Plaintiff's Memorandum further acknowledges that Mr. Saccone was able to utilize the more than 1500 pages disclosed through Mr. Saccone's FOIA request in order to mount a defense in Toolasprashad's administrative removal proceedings, and

that those administrative removal proceedings are the subject of an ongoing Petition for Review proceeding before the United States Court of Appeals for the Second Circuit.¹ Plaintiff's Memorandum, p. 5. Thus, even if the Court were to find that there is jurisdiction to review Toolasprashad's claim, the Complaint fails to state a claim upon which relief can be granted and the precise request made in Toolasprashad's defective FOIA has been fulfilled. Toolasprashad's Complaint fails on the merits.

CONCLUSION

For the reasons set forth herein and in Defendant's prior Memorandum (Dkt. No. 11), Toolasprashad's Complaint should be dismissed in its entirety, or alternatively, judgment should be granted to Defendant.

Dated: Buffalo, New York, May 9, 2013.

Respectfully submitted,

WILLIAM J. HOCHUL, JR.
United States Attorney
Western District of New York
138 Delaware Avenue
Buffalo, New York 14202

By: S/GAIL Y. MITCHELL
Assistant United States Attorney

¹A copy of docket entries from Toolasprashad's Petition for Review proceeding which is pending in the Second Circuit Court are attached hereto as an addendum.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

LATCHMIE TOOLASPRASHAD,

Plaintiff,

v.

11-CV-0922Sc

IMMIGRATION & CUSTOMS ENFORCEMENT,

Defendant.

CERTIFICATE OF SERVICE

I hereby certify that on May 10, 2013, I electronically filed the foregoing **DEFENDANT'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION TO DISMISS THE COMPLAINT FOR LACK OF JURISDICTION AND FAILURE TO STATE A CLAIM** with the Clerk of the District Court using its CM/ECF system, which would then electronically notify the following CM/ECF participant(s) on this case:

Eric W. Schultz, Esq.

I further certify that on May 10, 2013, I have mailed the foregoing **DEFENDANT'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION TO DISMISS THE COMPLAINT FOR LACK OF JURISDICTION AND FAILURE TO STATE A CLAIM**, by the United States Postal Service, to the following non-CM/ECF participant at his last known address:

LATCHMIE TOOLASPRAHAD
#35648936
Buffalo Federal Detention Facility
4250 Federal Drive
Batavia, New York 14020

S/DIANE E. CARLSEN
Legal Assistant

U.S. Circuit Court of Appeals

US Circuit Court of Appeals - 02nd Circuit

13-85

Toolasprashad v. Holder

This case was retrieved from the court on Monday, May 06, 2013

Header

Case Number: 13-85

Date Filed: 01/11/2013

Date Full Case Retrieved: 05/06/2013

NOS Description: (0) 0;; Appeal

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Summary

No Information is Available for this case

Associated Cases

No Information is Available for this case

Participants

Litigant

Latchmie Narayan Toolasprashad
Petitioner
Prisoner Number: -: A035-648-936

Eric H. Holder, Jr., United States Attorney General
Respondent

Attorney

Latchmie Narayan Toolasprashad
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Susan Bennett Green
[COR LD NTC US Attorney]
United States Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, DC 20044
202-532-4333

Oll
[NTC Government]

ADDENDUM

United States Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, DC 20044
202-616-4900

Proceedings

<u>Date</u>	<u>Details</u>
01/11/2013	PETITION FOR REVIEW OF AGENCY ORDER, on behalf of Petitioner Latchmie Narayan Toolasprashad, FILED. [815056] [13-85]
01/11/2013	AGENCY DECISION AND ORDER, dated 12/21/2012, RECEIVED.[815063] [13-85]
01/11/2013	MOTION, for stay of removal, on behalf of Petitioner Latchmie Narayan Toolasprashad, FILED. Service date 01/08/2013 by US mail.[815071] [13-85]
01/11/2013	MOTION, to proceed in forma pauperis, on behalf of Petitioner Latchmie Narayan Toolasprashad, FILED. Service date 01/08/2013 by US mail.[815077] [13-85]
01/11/2013	MOTION, to seal document, on behalf of Petitioner Latchmie Narayan Toolasprashad, FILED. Service date 01/08/2013 by US mail.[815084] [13-85]
01/14/2013	Petition For Review of Agency Order, Served. [815085] [13-85]
01/14/2013	INSTRUCTIONAL FORMS, to Pro Se litigant, SENT.[815089] [13-85]
01/14/2013	DEFECTIVE DOCUMENT, MOTION FOR STAY OF REMOVAL, MOTION TO SEAL DOCUMENT, , , on behalf of Petitioner Latchmie Narayan Toolasprashad, FILED.[815100] [13-85]
01/14/2013	DEFECTIVE DOCUMENT, MOTION TO PROCEED IN FORMA PAUPERIS, , on behalf of Petitioner Latchmie Narayan Toolasprashad, FILED.[815124] [13-85]
01/16/2013	NOTICE OF APPEARANCE AS SUBSTITUTE COUNSEL, on behalf of Respondent Eric H. Holder, Jr., FILED. Service date 01/16/2013 by CM/ECF. [817934] [13-85]
01/16/2013	ATTORNEY, Susan Bennett Green, , in place of attorney Lisa M. Arnold , SUBSTITUTED.[818058] [13-85]
01/18/2013	MOTION, for assignment of pro bono counsel, on behalf of Petitioner Latchmie Narayan Toolasprashad, FILED. Service date 01/11/2013 by US mail.[820804] [13-85]
01/18/2013	Papers, Abundance of Psychological And Psychiatric Evidence, Received.[820813] [13-85]
01/22/2013	OPPOSITION TO MOTION for stay of removal , on behalf of Respondent Eric H. Holder, Jr., FILED. Service date 01/22/2013 by CM/ECF. [823035][14] [13-85]
01/23/2013	DEFECTIVE DOCUMENT, OPPOSITION TO MOTION FOR STAY OF REMOVAL, , on behalf of Respondent Eric H. Holder, Jr., FILED.[823211] [13-85]
01/23/2013	MOTION, to proceed in forma pauperis, on behalf of Petitioner Latchmie Narayan Toolasprashad, FILED. Service date 01/11/2013 by US mail.[824399] [13-85]
01/23/2013	ACKNOWLEDGMENT AND NOTICE OF APPEARANCE FORM, on behalf of Party Latchmie Narayan Toolasprashad, FILED. Service date 01/11/2013 by US mail.[824401] [13-85]
01/23/2013	CURED DEFECTIVE, MOTION TO PROCEED IN FORMA PAUPERIS, , on behalf of Petitioner Latchmie Narayan Toolasprashad, FILED.[824403] [13-85]--[Edited 01/24/2013 by KR]
01/23/2013	DEFECTIVE DOCUMENT, MOTION FOR ASSIGNMENT OF PRO BONO COUNSEL, , on behalf of Petitioner Latchmie Narayan Toolasprashad, FILED.[824438] [13-85]
01/23/2013	MOTION, for stay of removal, on behalf of Petitioner Latchmie Narayan Toolasprashad, FILED. Service date 01/16/2013 by US mail.[824513] [13-85]
01/24/2013	OPPOSITION TO MOTION for stay of removal , on behalf of Respondent Eric H. Holder, Jr., FILED. Service date 01/22/2013 by CM/ECF. [824969][22] [13-85]
01/24/2013	CURED DEFECTIVE, OPPOSITION TO MOTION FOR STAY OF REMOVAL, , on behalf of Petitioner Latchmie Narayan Toolasprashad, FILED.[825041] [13-85]
01/30/2013	ADMINISTRATIVE RECORD ON APPEAL, submitted on CD ROM, FILED.[831259] [13-85]
01/30/2013	MOTION, for assignment of pro bono counsel, on behalf of Petitioner Latchmie Narayan Toolasprashad, FILED. Service date 01/28/2013 by US mail.[835527] [13-85]
01/30/2013	REPLY TO OPPOSITION , on behalf of Petitioner Latchmie Narayan Toolasprashad, FILED. Service date 01/28/2013 by US mail.[835536][30] [13-85]
01/31/2013	Papers, Motion For Assignment of Pro Bono Counsel T1080 Form, Certificate of Service, Received.

- [835626] [13-85]
- 02/04/2013 CURED DEFECTIVE, MOTION FOR ASSIGNMENT OF PRO BONO COUNSEL, , on behalf of Petitioner Latchmie Narayan Toolasprashad, FILED.[835551] [13-85]
- 02/14/2013 MOTION, for meditation consideration, on behalf of Petitioner Latchmie Narayan Toolasprashad, FILED. Service date 02/08/2013 by US mail.[849327] [13-85]
- 02/14/2013 MOTION, to seal document, on behalf of Petitioner Latchmie Narayan Toolasprashad, FILED. Service date 02/08/2013 by US mail.[849328] [13-85]
- 02/14/2013 SUPPLEMENTARY PAPERS TO MOTION , on behalf of Petitioner Latchmie Narayan Toolasprashad, FILED. Service date 02/08/2013 by US mail.[849338][44] [13-85]
- 02/14/2013 SUPPLEMENTARY PAPERS TO MOTION , on behalf of Petitioner Latchmie Narayan Toolasprashad, FILED. Service date 02/08/2013 by US mail.[849571][45] [13-85]
- 02/19/2013 CURED DEFECTIVE, MOTION TO SEAL DOCUMENT, , on behalf of Petitioner Latchmie Narayan Toolasprashad, FILED.[849575] [13-85]
- 02/25/2013 CERTIFICATE OF SERVICE, for ADMINISTRATIVE RECORD LETTER, on behalf of Respondent Eric H. Holder, Jr., FILED. Service date 02/25/2013 by CM/ECF.[856378] [13-85]
- 02/25/2013 MOTION, to transfer case evidence back to second circuit, on behalf of Petitioner Latchmie Narayan Toolasprashad, FILED. Service date 02/20/2013 by US mail.[857344] [13-85]
- 02/27/2013 IMMIGRATION 90-DAY TOLLING ORDER, copy sent to pro se, FILED. [859078] [13-85]
- 02/28/2013 IMMIGRATION TOLLING CANCELLATION LETTER, on behalf of Respondent Eric H. Holder, Jr., FILED. Service date 02/28/2013 by CM/ECF. [860291] [13-85]
- 03/05/2013 TOLLING CANCELLATION ORDER, copy sent to pro se, FILED. [864370] [13-85]
- 03/05/2013 MOTION, to dismiss, on behalf of Respondent Eric H. Holder, Jr., FILED. Service date 03/05/2013 by CM/ECF. [865457] [13-85]
- 03/11/2013 LETTER, dated 03/04/2013, on behalf of Petitioner Latchmie Narayan Toolasprashad, RECEIVED. Service date 03/04/2013 by US mail.[874394] [13-85]
- 03/11/2013 SCHEDULING NOTIFICATION, on behalf of Petitioner Latchmie Narayan Toolasprashad, informing Court of proposed due date 06/02/2013, RECEIVED. No Service. [874409] [13-85]
- 03/12/2013 MOTION, to seal document, on behalf of Petitioner Latchmie Narayan Toolasprashad, FILED. Service date 03/06/2013 by US mail.[872026] [13-85]
- 03/12/2013 MOTION, to submit an abundance of psychological and psychiatric evidence, on behalf of Petitioner Latchmie Narayan Toolasprashad, FILED. Service date 03/06/2013 by US mail.[872036] [13-85]
- 03/12/2013 MOTION, to withdraw document, on behalf of Petitioner Latchmie Narayan Toolasprashad, FILED. Service date 03/06/2013 by US mail.[872045] [13-85]
- 03/12/2013 MOTION, to seal document, on behalf of Petitioner Latchmie Narayan Toolasprashad, FILED. Service date 03/06/2013 by US mail.[872050] [13-85]
- 03/13/2013 DEFECTIVE DOCUMENT, SCHEDULING NOTIFICATION, , on behalf of Petitioner Latchmie Narayan Toolasprashad, FILED.[874428] [13-85]--[Edited 03/13/2013 by KR]
- 03/14/2013 OPPOSITION TO MOTION to submit an abundance of psychological and psychiatric evidence, , on behalf of Respondent Eric H. Holder, Jr., FILED. Service date 03/14/2013 by CM/ECF. [876352][74] [13-85]--[Edited 03/15/2013 by KR]
- 03/22/2013 MOTION, for petitioner's notice of being unable to file objections to respondent's motion to dismiss and renewed motion for appointment of counsel, on behalf of Petitioner Latchmie Narayan Toolasprashad, FILED. Service date 03/18/2013 by US mail.[887008] [13-85]
- 03/22/2013 SCHEDULING NOTIFICATION, on behalf of Petitioner Latchmie Narayan Toolasprashad, informing Court of proposed due date 06/02/2013, RECEIVED. Service date 03/13/2013 by US mail.[887017] [13-85]
- 03/25/2013 CURED DEFECTIVE, SCHEDULING NOTIFICATION, , on behalf of Petitioner Latchmie Narayan Toolasprashad, FILED.[887019] [13-85]

Pending Motion

No Information is Available for this case

Brief

No Information is Available for this case

Rehearings

No Information is Available for this case

History

No Information is Available for this case

Additional Case

Additional Case Information

Agency - Petition for Review - Immigration

Appeal from: Immigration & Naturalization Service

District: INS Division: 1 CaseNumber: A035-648-936

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